

No. 16309
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

FRED STEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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I.

JURISDICTIONAL STATEMENT.

Appellant Fred Stein was indicted March 5, 1958, by the Federal Grand Jury at Los Angeles, California. [Tr. pp. 1-6.] The indictment is in six counts.

Count One charges appellant with a conspiracy (18 U. S. C., Sec. 371) between him and three "unindicted co-conspirators," Quentin Browning, Clarence Winfrey and Celeste Winfrey. It is alleged in the indictment that the conspiracy was formed on or about January 1, 1956, and ended on or about July 11, 1957. The conspirators are charged with receiving, concealing, transporting and facilitating the concealment and transportation of heroin and of concealing and facilitating the sale of heroin. Seventeen overt acts are alleged as having occurred between January 21, 1956, and July 11, 1957.

Count Two charges appellant (21 U. S. C., Sec. 174) with having on or about January 21, 1956, sold and facilitated the sale of approximately two ounces of heroin to one of the "unindicted co-conspirators," Quentin Browning. Count Two¹ is a repetition of the first overt act charged in Count One.

Count Three charges appellant (21 U. S. C., Sec. 174) with having on or about January 21, 1956, facilitated the sale of approximately two ounces of heroin to two of the "unindicted coconspirators," Clarence Winfrey and Celeste Winfrey. Count Three is a repetition of overt act No. 1 (Count One) and a repetition of Count Two except in Count Three the sale of the same two ounces of heroin is charged as having been made by appellant to the "unindicted coconspirators," Clarence Winfrey and Celeste Winfrey, instead of to "unindicted coconspirator," Quentin Browning.

Count Four charges appellant (21 U. S. C., Sec. 174) with the sale and facilitation of the sale on February 15, 1956, of approximately three ounces of heroin to "unindicted coconspirators," Clarence Winfrey and Celeste Winfrey. Count Four charges as a specific offense overt acts Nos. 3, 4, 6 and 7 of Count One.

Count Five charges that appellant (21 U. S. C., Sec. 174) on September 10, 1956, sold and facilitated the sale of approximately five ounces of heroin to "unindicted coconspirator," Quentin Browning. Count Four charges as a specific offense overt acts Nos. 8, 9 and 10 alleged in Count One.

¹The Court dismissed Count Two at the trial.

Count Six charges that appellant (21 U. S. C., Sec. 174) on March 3, 1957, sold and facilitated the sale of approximately three ounces of heroin to "unindicted co-conspirators," Clarence Winfrey and Celeste Winfrey. Count Six charges as a specific offense overt acts Nos. 15 and 16 alleged in Count One.

The case was called for trial September 16, 1958, before the Honorable Peirson M. Hall, Judge, with a jury. [Rep. Tr. p. 4.] The jury returned its verdict September 22, 1958, finding the appellant guilty as charged on Counts One, Three, Four, Five and Six. [Rep. Tr. p. 67.] Counsel for appellant, Paul W. Sweeney, announced that he would file a motion for new trial. (Rule 33, F. R. Cr. P.; 18 U. S. C.) The Court denied appellant the right accorded him by Rule 33 to file his motion for new trial within 5 days after the verdict. The Court stated that it would hear a motion for new trial if the motion were filed in the afternoon of that day, September 22. At the time the Court made that declaration it was 3:40 P.M. [Rep. Tr. pp. 639-640.] The Court then continued the matter of the motion for new trial until 11:00 o'clock September 23, 1958. [Rep. Tr. p. 640.]

The next day, September 23, the Court denied appellant's motion for new trial and motion for judgment notwithstanding the verdict. [Rep. Tr. p. 70, lines 12-14.] Immediately after the denial of motion for new trial and judgment notwithstanding the verdict and on September 23 the Court rendered its judgment sentencing the appellant to 20 years on Count One, to 20 years on Count Three, the sentences on these two counts to run concurrently, 10 years on Count Four, 10 years on Count Five and 10 years on Count Six to run consecutively with each other and consecutively with the concurrent 20-year sen-

tences on Counts One and Three, making a total sentence of 50 years. [Tr. pp. 70-71.]

Appellant Stein filed his notice of appeal to this Court September 26, 1958. [Tr. p. 74.] Stein has been committed to and is now in the custody of the United States Marshal for the Southern District of California pursuant to order of the District Court made October 15, 1958. [Tr. p. 76.] Stein has been denied bail pending his appeal by the District Court and by this Court. The District Court had jurisdiction. (Title 18 U. S. C. Sec. 3231.)

The jurisdiction of this Court is invoked under Sections 1291 and 1294(1) of Title 28, U. S. C.

II.

PERTINENT STATUTES.

This case involves Title 18, U. S. C., Section 371, and Title 21, U. S. C., Section 174, which statutes are quoted below:

Title 18, U. S. C., Section 371: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

Title 21, U. S. C., Section 174: “Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violaton of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

“Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

“For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.”

III.

STATEMENT OF THE CASE.

Appellant Stein, a man 51 years old [Rep. Tr. p. 649] appeals from a judgment sentencing him to 50 years in the penitentiary. The Court intended the 50-year sentence to be a life sentence as the Court stated when sentencing appellant to 50 years: “The Court feels justified

in completely isolating him (appellant) from society.” [Rep. Tr. p. 651, lines 22-23.] The Court could not grant the appellant probation or suspend his sentence. Appellant is not entitled to parole. (21 U. S. C., Sec. 174; 26 U. S. C., Sec. 7237(d).) The 50-year sentence is more severe than a life sentence. A prisoner with a life sentence may be paroled. Appellant would, if he should live so long, be 101 years old when his sentence expires. If appellant’s sentence were shortened for good behavior to three-fourths of his 50-year term, appellant would be 88 years old at the time of his release.

When the case was called for trial, Attorney Paul W. Sweeney, who appeared for appellant at the trial, moved the Court for a continuance [Rep. Tr. pp. 4-8] upon the grounds that other counsel who had appeared for appellant, Harry Weiss and Arthur Sherman, were not present; that he, Sweeney, was not mentally or physically able to go ahead with the trial as he, himself, was at the time charged in the Superior Court of Los Angeles California, with a violation of the state Narcotics Law (*Cal. Health and Safety Code*, Sec. 11500) and that he was also charged in the same information with offering a bribe to state and county officials in connection with the narcotics charge (*Cal. Penal Code*, Secs. 67 and 67½); that a continuance should be had so as to permit the appellant to obtain other counsel in place of Sweeney as he, Sweeney, because of his distressed condition of mind and because of the large amount of adverse publicity which had appeared concerning his, Sweeney’s, alleged felonies, did not feel competent to try the case for appellant; that he was appearing for the appellant at the opening of the trial for the sole purpose of getting a continuance in order that the appellant might obtain other coun-

sel; that he, Sweeney, could not properly defend appellant because of the probability that in the defense of appellant, he, Sweeney, might damage the defense of his own narcotics case and bribery case pending in the Superior Court at Los Angeles. The Court instead of granting the motion for a continuance in effect compelled the appellant to sign a designation of Sweeney as his counsel. [Rep. Tr. pp. 64-66.]

The Court compelled the appellant to file and to present his motion for new trial within 19 hours after the verdict was returned, refusing to give appellant the five days allowed a defendant by Rule 33 of the Federal Rules of Criminal Procedure to make a motion for new trial. [Rep. Tr. pp. 639-646.]

Appellant was convicted solely upon the testimony of three admitted accomplices, Quentin Browning, Clarence Winfrey, and his wife Celeste Winfrey. There is no other evidence of any sort, directly or circumstantial, that Stein committed any of the offenses charged in the indictment other than the testimony of these three accomplices. Appellant had met Browning and Clarence Winfrey when all three of them were serving terms in McNeill Island for narcotics violations. Browning lived in San Francisco. Browning was arrested in San Francisco on a narcotics charge in the latter part of September or the early part of October, 1956. [Rep. Tr. p. 151.] Celeste Winfrey, the wife of Clarence Winfrey, living in Los Angeles, was arrested on a narcotics charge March 12, 1957. [Rep. Tr. p. 223.] The Federal officers who arrested Browning evidently promised him immunity if he would act as an informer. Browning, having served with Stein in the penitentiary in McNeill Island on narcotics charges and with Clarence Winfrey on a similar charge,

selected Stein as a likely prospect upon whom to lodge the blame and went to work with his former prison mate, Clarence Winfrey, to accomplish his purpose. [Rep. Tr. pp. 87, 88, 90, 132, 135, 140, 249, 453.]

Browning was unable to get any credible information from Winfrey which would tend to incriminate Stein, so in order to further the plan, Browning made some deals with Clarence Winfrey and his wife Celeste Winfrey. Celeste was arrested in Los Angeles on a Federal narcotics charge, March 12, 1957. [Rep. Tr. p. 223.] The stage was now set to incriminate Stein if possible. Browning was under arrest [Rep. Tr. p. 147] and Celeste Winfrey, Clarence Winfrey's wife, was under arrest, so in their language they told the officers everything. [Rep. Tr. pp. 148, 150, 242, 243.]

Clarence Winfrey, Celeste Winfrey's husband, stated on cross-examination that he had not mentioned appellant to the narcotics officers until after his wife, Celeste Winfrey, had been arrested on a federal narcotics charge. [Rep. Tr. p. 244.] In order to help his wife out of the difficulties arising from her arrest, Clarence Winfrey began working with the Government. [Rep. Tr. pp. 241-242.] The Government gave him \$2,100 for the purpose of trying to make a buy from appellant. [Rep. Tr. p. 241.] Winfrey took the \$2,100 from officers with the understanding that if he could make a buy from appellant he would help his wife, Celeste, by so doing. [Rep. Tr. p. 243.] It appears from Winfrey's testimony that all that was done after his wife was arrested and all he told the officers was told after his wife's arrest with the sole idea of helping his wife to escape trial. Winfrey was extremely indefinite in his testimony and claimed that he had no recollection whatsoever as to the times mentioned in the indictment. [Rep. Tr. pp. 246-247.]

Browning's testimony is, like Winfrey's, colored by the effort to save himself from prosecution for his arrest. Browning was arrested in San Francisco by Federal narcotics officers some time in September or October, 1956. [Rep. Tr. p. 151.] Browning, in order to save himself from prosecution for the sale of narcotics for which he had been arrested, made some sort of deal with the Federal officers to catch appellant. From Browning's testimony we glean that, if he could lay the blame upon someone as a source of the narcotics charge, the officers would allow him to go free. [Rep. Tr. pp. 147-161.]

Browning brought in the name of Stein the day he was arrested. [Rep. Tr. p. 159.] The appellant had a prior Federal narcotics conviction; so did the main witnesses against him, Quentin Browning and Clarence Winfrey. Browning told the Federal officers that he would testify against appellant if appellant should be indicted. [Rep. Tr. p. 149.] Evidently the officers did not think they could rely upon the testimony of this accomplice who had served a term in McNeill Island for a narcotics charge, so they attempted to have Browning, through Winfrey, another narcotics loser, make a buy from Stein. At the time Browning was out on bail on his San Francisco arrest. [Rep. Tr. p. 152.] The arraignment of Browning before the United States Commissioner at San Francisco and the fixing of bail and his release on bail ended the case against Browning, if he would implicate appellant. Browning's case seems never to have been presented to the Grand Jury in San Francisco. [Rep. Tr. p. 153.] Nor the case against Celeste Winfrey in Los Angeles.

Appellant was convicted on Counts One, Three, Four, Five and Six of the indictment solely upon the testimony of the accomplices, Browning and Winfrey, and the accomplice Celeste Winfrey, Clarence Winfrey's wife.

There is no evidence in the record of anyone ever overhearing any conversations between Browning and appellant. Clarence Winfrey and appellant, or Celeste Winfrey and appellant. There is not a word of evidence in the record outside of that of the accomplices, that appellant sold or facilitated the sale, or otherwise trafficked in narcotics other than the testimony of those three. No other witness testified to the passage of narcotics between anyone and appellant or the passage of any money between appellant and any one of these three, other than the three accomplices. No marked money was discovered in appellant's possession. No narcotics were found in his possession. He has been convicted solely upon the testimony of the three admitted accomplices, called "unindicted co-conspirators," the two principal ones of which were former convicted felons on narcotics charges and two of whom were under arrest for the sale of narcotics in which the Government seems to have had them cold and from which they could extricate themselves only by furnishing testimony, of which there is not one word of corroboration in the record that appellant was their source of supply.

Appellant Stein took the stand in his own defense and testified. [Rep. Tr. pp. 409-487.] While appellant admitted that he knew Browning and Winfrey up north, which meant to them McNeill Island, he denied that he had ever had any transaction of any sort in narcotics with them or either of them or with Celeste Winfrey. [Rep. Tr. pp. 415, 419, 432, 433, 442, 448.]

When the case was called for trial September 16, 1958, the only attorney designated of record for appellant by an appearance praecipe was Harry E. Weiss, 448 South Hill Street, Los Angeles. This praecipe was filed April 7, 1958, and was signed by appellant Fred Stein and by his attorney, Harry E. Weiss. [Tr. p. 15.] Paul W.

Sweeney had appeared several times in the case before that on motions, continuances, and such matters for appellant, but he appears to have been doing so for Harry Weiss, as there was no designation of Sweeney as counsel and no appearance praecipe signed until after the opening of the trial September 16, 1958, when the Court in effect compelled Stein to sign a praecipe dated September 16, 1958. [Rep. Tr. pp. 67-69; Tr. p. 35.]

The appellant contends that he did not have a fair trial; that the evidence was insufficient to sustain his conviction on Counts One, Three, Four, Five and Six, upon which he was convicted; and, that the Court erred in its rulings on the admission and rejection of evidence.

IV.

ASSIGNMENT OF ERRORS.

1. The trial court erred in denying appellant's motion for a continuance made at the opening of the trial by Paul W. Sweeney, who advised the Court that he was appearing for appellant only for the purpose of obtaining a continuance upon the grounds: (a) That he, Sweeney, was not mentally or nervously in any condition to try the case because he had recently received some very unfavorable publicity widely covered by radio, television and newspapers. While Mr. Sweeney was somewhat vague in reference to his difficulties he undoubtedly referred to his arrest by State officers August 29, 1958, for possession and transportation of narcotics in violation of Section 11500 of the Health and Safety Code of California, a felony, and for his arrest for offering a bribe to the arresting officers in violation of Sections 67 and 67½ of the Penal Code of California, a felony, which charges were pending and untried at the time the appellant's case was

called;² (b) That he, Sweeney, did not want to defend appellant on the narcotics charge because the case might get some publicity and such publicity would materially affect Sweeney's defense at his trial on the narcotics and bribery charges which were pending against him in the Superior Court for Los Angeles; (c) That at the opening of the trial when Sweeney sought the continuance the only designation and praecipe of counsel on file for appellant was the one filed April 7, 1958, five months before the trial, signed "Fred Stein, Defendant" and "Harry E. Weiss, Attorney at Law," which has never been revoked. [Tr. p. 15.]

2. The Court erred in requiring appellant, after the trial had opened and after the motion for continuance had been made and denied, to designate Mr. Sweeney as his counsel and have Mr. Sweeney sign the praecipe, thus in effect compelling the appellant against his will to accept Mr. Sweeney as his attorney to represent him at the trial [Tr. p. 35] after Mr. Sweeney had confessed that he could not do a good job of defending appellant for fear his defense of the narcotics case might materially affect the defense to the narcotics charge pending against Sweeney in the state court.

The importance of Assignments of Errors numbers 1 and 2 requires extensive quotations from the reporter's transcript, so counsel believe, in order that full compliance may be had with Rule 18(d) of this Court. Accordingly we do so below :

"Mr. Sweeney: Your Honor, this is a motion to continue this matter based on three reasons:

²The type of publicity to which attorney Sweeney referred appears in the appendix where two newspaper articles on the subject are reproduced, one from the Los Angeles Times of August 30, 1958, and the other from the Los Angeles Tribune of Friday, September 5, 1958.

The first being that we were just aware of the fact that we were going to trial Friday of last week. We have been laboring under the impression, and offers have been made of a plea over in the State court, and this matter was discussed, or an offer was made, not with Mrs. Bulgrin, in fairness to her, because she was away on vacation—I think she does know something of mention being made of a plea over in the State court—there was a suggestion, because of the defendant's cooperation in the case of United States vs. Michael Cohen that was tried before Judge Clarke, that his cooperation in not testifying in behalf of Mr. Cohen, which I informed the Government of at the time that he was not going to testify in behalf of Mr. Cohen—

The Court: He did testify, did he not?

Mr. Sweeney: No, he did not. That was his brother. He did not. He was not available. Possibly there is some consideration in that.

Then there was some further discussion about the possibility of him testifying for the Government in this matter. As the court was aware, I also testified for the Government against Michael Cohen, so this matter, if we had known it was going to trial, we would have tried him many, many months ago before Judge Clarke, where the case was originally scheduled, but it was continued over pending this cause of United States v. Michael Cohen pursuant to—well, the joint motions were made, or either he made the motion and they were acquiesced in by the Government, to have these matters continued.

As of last week there was still another question pending about his testimony for the Government, and we did not prepare for trial because there had been an offer made—well, I will say, in all fairness, it wasn't an offer made but there was some discussion—

about whether or not he was going to be allowed to go to the State court to plead to a one-count indictment that was to be sought over there.

That did not materialize, as I understand it. Discussion was had with Mr. Waters, and I am informed, and I was informed Friday, that we would have to go to trial.

Now I am totally unprepared to go to trial in this matter, thinking that this might be worked out in the State court and so we did not prepare our defense.

Secondly, with reference to this trial memorandum, that I received today, I see that it is at variance materially with the indictment, or the facts of the indictment, in that the indictment alleges certain overt acts alleged to have been committed by Fred Stein as a part of the indictment, and when we were before Judge Clarke we did prepare defenses toward those overt acts, and in reading this synopsis of the facts presented to me today in the trial memorandum, it varies materially in the material facts that they intend to prove.

The Court: That variation can be taken care of by appropriate objections to the introduction of evidence, if it is material.

Mr. Sweeney: They are different overt acts which we have not had any time at all to prepare or defend against.

The Court: If they are alleging different overt acts than that the evidence would not be admissible on it.

Mrs. Bulgrin: I don't think that is quite true, your Honor, but I didn't want to interrupt Mr. Sweeney on his presentation.

Mr. Sweeney: That is my impression of the matter.

Thirdly, there is a question of the recent publicity which I have received in this affair over on the State side by my arrest on this—what was it, bribery incident—that was widely covered by radio, television and the newspapers, having been carried on the front page of the newspapers and being discussed over television as well as over the radio.

Mr. Stein came to me and asked me, did I feel in light of all that had recently happened, was I in the proper mental attitude to represent him, and I informed him that I was not.

I felt that because of the nature of this kind of charge and the publicity that this case might get, it might materially affect any defense that I might have as to my action if I were to be connected in any way to any sort of situation like that.

The Court: That occurred several weeks ago?

Mr. Sweeney: It occurred two weeks ago.” [Rep. Tr. p. 4, line 22, to p. 8, line 2.]

After making the motion and the Court announced that the case would go to trial that morning of September 16, 1958, Mr. Sweeney said to the Court:

“Mr. Sweeney: I would like the record to indicate that I am totally both mentally and physically unable to go to trial.

The Court: You have been the attorney for this defendant since he was indicted.

Mr. Sweeney: No. We have had substitution of attorneys.

Mrs. Bulgrin: Mr. Sweeney was the attorney at least in—when did I first talk to you about it?

Mr. Sweeney: I think Mr. Weiss was the first attorney.

The Court: Russell Parsons.

Mr. Sweeney: Then it was Mr. Weiss.

The Court: Mr. Weiss.

Mrs. Bulgrin: I think as of April 28th, when I got the case, your Honor, that Mr. Sweeney was the attorney.

Mr. Sweeney: I don't think there is any designation filed.

The Court: Here is Paul Sweeney.

Mr. Sweeney: What date was that?

The Court: April 28, 1958.

Mrs. Bulgrin: My assignment date was on 6-17-58 and Mr. Sweeney appeared in court then.

Mr. Sweeney: I am not denying the fact that I have appeared and represented the defendant. I just wanted the record to indicate my position in the matter.

The Court: I am sorry that I cannot agree with you, counsel. We will go to trial." [Rep. Tr. p. 9, line 25, to p. 11, line 2.]

After the jury had been empanelled the trial court called counsel to the bench outside the hearing of the jury, and the following quotations from the transcript, pages 60 through 68, show the further grounds on which the motion for continuance was based:

"The Court: Very well.

Will counsel approach the bench, please, with the defendant.

(The following proceedings were had between court and counsel at the bench, with the defendant present, outside the hearing of the jury):

The Court: In the records here it appears as though you first appeared for this defendant on March 10, 1958, that thereafter an appearance praecipe was filed by Harry Weiss on April 7th. There

does not appear to be a substitution of counsel. You appeared again on April 28th and have since from time to time appeared for this defendant in all matters.

Is Mr. Paul Sweeney your counsel, Mr. Stein?

The Defendant: Your Honor, I would like to get another attorney.

The Court: Has he been your attorney?

The Defendant: Yes, he has appeared for me here.

The Court: Has he been your attorney in this case?

The Defendant: No, he has not.

The Court: Was he your attorney on March 10th?

The Defendant: He has made the appearances here.

The Court: Was he your attorney? Did you authorize him to appear for you?

The Defendant: Yes.

The Court: Did you authorize him to appear here at the subsequent times that he did appear?

The Defendant: No. He came up. The Government, I understand, asked for the postponement and that Mr. Sweeney was to make the motions, and he called me—" [Rep. Tr. p. 60, line 15, to p. 61, line 19.]

"The Court: Who is your lawyer?

The Defendant: Well, Mr. Weiss was my attorney up until when Mr. Paul Sweeney made his first appearance and Mr. Weiss stepped out.

The Court: Up until Mr. Sweeney appeared?

The Defendant: Yes, sir.

The Court: Mr. Sweeney has been your attorney since June 17?

Mr. Sweeney: We have been co-counsel I think together at the time of the appearance. We were co-counsel at the time of trial setting.

The defendant informs me that since that time Mr. Weiss was no longer representing him.

The Defendant: That is right.

Mr. Sweeney: I asked him about that today, whether he was going to help try this matter or not.” [Rep. Tr. p. 62.]

* * * * *

“The Court: Have you since discharged Mr. Sweeney?

The Defendant: We discussed it.

The Court: Have you discharged him?

The Defendant: No. That was for the continuance which was for today so I could get other counsel.

The Court: No, this is not August 12th. June 17th to August 12th I do not find any minute in the file since that date. You were here in this court on August 12th and secured a continuance for resetting.

Mr. Sweeney: Yes, I did. I appeared for that.

The Court: And it was set to this date.

Mr. Sweeney: It was set to this date.

The Court: He was authorized to represent you then?

The Defendant: Yes.

The Court: You have made no move to get any other counsel in the meantime?

The Defendant: I have, yes.

The Court: Have you secured any other counsel?

The Defendant: Yes, sir.

The Court: Yes?

The Defendant: Yes.

The Court: You knew that this case was set on August 12th at this date.

The Defendant: Mr. Sweeney and I discussed it and he told me he wasn't capable, in view of his troubles, to give me the proper defense that I was entitled to. Yes, sir. I talked to some other people in regard to getting another attorney." [Rep. Tr. p. 63, line 7, to p. 64, line 9.]

* * * * *

"The Court: I have here an appearance designation of counsel. Now do you refuse to sign it?

The Defendant: (Pause.)

The Court: Do you refuse to sign designating Mr. Sweeney as your lawyer?

The Defendant: Yes.

The Court: You do or do not?

The Defendant: I will sign it.

The Court: This is dated March 10th.

Mr. Sweeney: I don't know whether you should consult someone else or not.

(Conference between counsel and the defendant.)

Did you make a telephone call this afternoon to try to get other counsel?

The Defendant: Yes.

Mr. Sweeney: Did you get him?

The Defendant: No.

Mr. Sweeney: There is no doubt in my mind but that Harry Weiss and myself were representing him at all those times. Now when I talked about representation that was since September, whenever the publicity came out about me, and then I called him

and asked him—well, he called me and asked, did I want to continue, and that is the only time the matter of attorneys has come up. At all times though I did think that I was representing him along with the offices of Harry Weiss.

The Court: Who is your lawyer?

The Defendant: I talked to Mr. Weiss.

The Court: No, who is your lawyer, not who you talked to. Who is your lawyer?

Mr. Sweeney: I am one of them.

The Defendant: Mr. Sweeney.

The Court: Mr. Sweeney is your lawyer?

The Defendant: Yes.

The Court: Very well. You can sit down there at the table and talk to Mr. Sweeney. I will declare a few moments' recess, before you put any witness on the stand.

Mrs. Bulgrin: Yes, your Honor.

The Court: You make up your mind whether or not Mr. Sweeney is your lawyer.

Mr. Sweeney: All right, sir." [Rep. Tr. p. 64, line 16, to p. 66, line 6.]

* * * * *

"The Court: Is Harry Weiss one of your lawyers?

The Defendant: Yes, sir.

The Court: I will declare a recess. The clerk will call Mr. Weiss and get him over here, wherever he is.

The Defendant: I talked to Mr. Weiss—

The Court: Otherwise I will send the United States Marshal for him.

Is there a United States Marshal present?

The Clerk: Yes, your Honor.

Mr. Sweeney: Let me make a call to Mr. Weiss, your Honor. I am going to represent this defendant and I am going to also call Mr. Weiss and find out just what his position is in the matter.

The Court: Mr. Weiss had better get over here. This is not the first time that this has happened, and I sort of have a feeling that Mr. Weiss is playing horse with the courts.

Mr. Sweeney: No, your Honor. In all fairness to Mr. Weiss, he advised me Friday that he did not think that he was going to appear in this matter and asked me what I was going to do in the matter, and at that time I advised Mr. Weiss that I was going to seek a continuance in order for Mr. Stein to get another attorney in light of my feeling about this thing, if for no other reason. I think Mr. Stein has been satisfied with my services thus far and is confident to have me continue. But it was just my personal feeling in light of my own situation that just made me wonder whether I would be best at this particular time to try what I think was a very important thing in his life with my own troubles as they are.

The Court: It is up to the defendant to make up his mind.

Mr. Sweeney: That I know. I don't think Mr. Weiss is in any way trying to avoid this.

The Court: We went through one case, not before me but before another judge, where Mr. Weiss' office represented a client, they appeared repeatedly before three different judges, they took six days to try it, the defendant was convicted and when it came time for sentence the defendant got up and said that he was not his lawyer at all and had never retained him.

The Court: I want to know now from Mr. Stein who your lawyer is.

The Defendant: Mr. Sweeney.

The Court: Mr. Sweeney is your lawyer?

The Defendant: Yes, sir.

The Court: Very well. You can date that as of today.

The Clerk: Shall I get a new blank, your Honor?

The Court: No, that is all right. Strike it out and date it as of today.

Do you wish Mr. Sweeney to be substituted in place and stead of Harry Weiss?

The Defendant: Yes, sir.

The Court: Very well. The motion is granted and Mr. Sweeney is substituted as sole counsel for the defendant Stein.

Mr. Sweeney: I think by tomorrow we are going to have another counsel that I will associate in the matter." [Rep. Tr. p. 66, line 14, to p. 68, line 22.]

3. The refusal of the Court to grant a continuance of the trial so that the appellant might secure other counsel to take the place of Sweeney, who had confessed his incompetence, denied the appellant a fair trial in that it denied him the right to select his own counsel and forced him to trial with incompetent counsel and one not of his own choosing. Among the many evidences of Sweeney's incompetence, the following are important:

(a) Attorney Sweeney failed to move the Court after the Government's witnesses, Quentin Browning, Clarence Winfrey, Celeste Winfrey, William C. Gilkey, William R. Farrington, James H. Mulgannon and Lawrence Katz, had testified to compel the Government to produce any statement made by the witnesses, and each of them, which

statement or statements relate to the subject matter on which the witnesses and each of them had testified. (18 U. S. C., Sec. 3500(b).)³

(b) Attorney Sweeney failed to object to questions by Government's counsel and by the Court designed to elicit defendant's income and sources of income during the periods of time covered by the charges in the indictment. [Rep. Tr. pp. 449-451.]

(c) Attorney Sweeney failed to object to the Court's remark during the course of the trial relative to the impeachment of defendant by showing his former conviction of a felony in that such remarks were too broad and prejudicial. [Rep. Tr. p. 452.]

(d) Attorney Sweeney failed to object to or move to strike the testimony elicited on the Court's introduction concerning the claim by the Government that the appellant was a bootlegger in prohibition days. [Rep. Tr. p. 458.]

(e) Attorney Sweeney failed to object to the questions of the Government relative to the claim that he was engaged in making horse racing bets and using the testimony to the detriment of appellant and which had the effect of prejudicing the jury against him. [Rep. Tr. pp. 460-462.]

³“(b) After a witness called by the United States (in a criminal case) has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.”

(f) Attorney Sweeney failed to protect appellant's rights by requesting the Court to give appropriate instructions relative to the alibis on Counts Five and Six proved by the defense and which might have brought about a different verdict of the jury on all counts of the indictment.

(g) Attorney Sweeney failed to recognize the importance of the testimony of the Government's main witness, Browning, that the so-called partnership between appellant and Browning for the handling of narcotics absolutely terminated in May, 1956, and to object to and move to strike all testimony as to the overt acts Nos. 8 to 17, inclusive [Tr. p. 3], occurring subsequent to May, 1956, and to request appropriate instructions to the jury on this subject.

(h) Attorney Sweeney failed to require government's counsel to fix the time and object to the testimony of Celeste Winfrey to the effect that appellant delivered her packages similar to the ones she first described eight or nine times prior to her arrest. [Rep. Tr. p. 261.]

(i) Attorney Sweeney failed to protect appellant's rights by failing to request the Court to give appropriate instructions on the law relating to conspiracy and to the law relating to an accomplice in view of the evidence in this case which necessitated the giving of such instructions. [Rep. Tr. pp. 521-527.]

(j) Attorney Sweeney failed at the appropriate time to take exception to the Court's instructions and permitted the erroneous instructions on the subject of accomplices and conspiracy and alibis to go unchallenged. [Rep. Tr. pp. 524-527, 601.]

(k) Attorney Sweeney failed to make a motion to acquit at the close of the case.

(l) Attorney Sweeney failed to produce vital and material evidence that appellant was in New York from the 5th to the 19th of September, inclusive, 1956. [Rep. Tr. pp. 373-378, 434.] The appellant offered to prove an alibi that he was in New York on September 10, 1956, which is the time laid in Count Five. Browning testified in support of Count Five [Rep. Tr. p. 124] that he came down from San Francisco to Los Angeles at the time charged in Count Five, purchased five ounces of heroin from appellant and took the heroin back to San Francisco and sold it.

To prove that appellant was in New York at the time, Sweeney offered a letter from Vincent J. Dolzen, the general manager of the Hotel Seymour, 50 West 45th Street, New York, dated April 18, 1958. [Deft. Ex. E for iden.] Defendant's Exhibit E showed that Stein was in New York City at the Seymour Hotel at all times from September 6 to September 19, inclusive, 1956, which would have been a complete answer to Browning's testimony that he purchased five ounces of heroin from appellant on September 10th. Appellant denied the alleged sale and all other alleged sales to Browning and to the Winfreys or anyone else. [Rep. Tr. p. 448.]

The Court sustained the Government's objection to the admission of this letter which would have been a complete acquittance of appellant on Count Five. The Court sustained the objection to the letter on the ground that the letter was hearsay. Attorney Sweeney or Attorney Weiss or Attorney Sherman, or some of the multiple attorneys for the appellant who have been connected with

the case, had the letter in their possession from its date of April 18, 1958. Any one of them should have known that it was inadmissible as hearsay but for some inexplicable reason the deposition of Vincent J. Dolzen was not taken, nor was he asked to appear as a witness on behalf of defendant. If Dolzen's deposition had been taken or had he appeared as a witness it would have established the falsity of Browning's testimony as to the alleged sale of September 10, 1956, for which he claims he paid appellant \$3,000 and would have required a jury to treat the rest of his testimony with suspicion.

4. The Court erred in admitting in answer to the question:

"The Witness (Browning): And Mr. Winfrey had said that he was interested in the stuff if the quality was what it was supposed to be."

Objection:

"Mr. Sweeney: Your Honor, I move that that conversation be stricken. There is no foundation shown that that was in the presence of this defendant." [Rep. Tr. p. 87.]

"The Court: And conversations out of the presence of one of the other conspirators are admissible if there is sufficient evidence from which a reasonable person could conclude that a conspiracy had been formed . . . They can join a conspiracy or they can drop out. She (the District Attorney) may be able to show that they joined. The objection is overruled." [Rep. Tr. pp. 87-88.]

5. The Court erred in receiving over objection of appellant the testimony of witness Browning in answer to the question, approximately how many ounces of heroin Browning obtained from Stein.

Objection:

“Mr. Sweeney: I object to that, your Honor, as leading and assuming facts not in evidence. I think he said it was a partnership, that it was his own.”
[Rep. Tr. p. 109.]

The testimony received was:

“A. I sold ten to one, three, that is thirteen, sold twelve, that is twenty-five, and plus the business that he had done with Mr. Winfrey and another time twenty-five all together 51.” [Rep. Tr. pp. 109-110.]

6. The Court erred in receiving the testimony of the witness Clarence Winfrey over the objection of appellant’s counsel as to the next time (after February, 1956) that he purchased any of the substance from Mr. Stein.
[Rep. Tr. p. 215.]

Objection:

“Mr. Sweeney: I move that be stricken as not responsive to the Court’s question. The testimony admitted was, ‘Several times I have seen him during the year.’ ”

7. The Court erred in admitting the testimony of the witness Clarence Winfrey over the objection of appellant’s counsel to the question as to how many occasions were there in January or February, 1957, that Clarence Winfrey bought merchandise from Mr. Stein.

Objection:

“Mr. Sweeney: Your Honor, I object to that. It assumes a fact not in evidence. He doesn’t remember what date at all in 1957.”

The testimony admitted was:

“I don’t know, maybe I saw him three or four times in that time.”

Winfrey in response to this line of questions testified that on those occasions he bought merchandise from Stein; that on or about March 3 he bought 3 ounces from Stein. [Rep. Tr. p. 219.]

8. The Court erred in receiving the testimony of witness Clarence Winfrey over the objection of appellant's counsel in answer to the question as to whether or not Clarence Winfrey bought over three ounces at a time from Mr. Stein.

Objection:

"Mr. Sweeney: Objected to as having been asked and answered."

The testimony received was:

"On some occasions I might have." [Rep. Tr. p. 220.]

9. The Court erred in admitting Government Exhibits 2A and 2B, containing a package of heroin, over the objection of appellant's counsel.

Objection:

"I will object for the purpose of the record."

The substance in question was claimed to have been purchased by a Mr. Beard from Celeste Winfrey and purchased by a Government agent from Beard. [Rep. Tr. pp. 330-334.]

10. The Court erred in receiving the testimony of the Government agent Gilkey over the objection of appellant's counsel to questions concerning the time that Gilkey testified he saw Mr. Beard go in the direction of Celeste

Winfrey's house, if he had given Beard any money and he testified that he gave him \$100 of official advance funds on which serial numbers had been noted and that he saw this money again shortly after the arrest of Celeste Winfrey on March 12, 1957, and that it was the same money given to Beard. [Rep. Tr. pp. 335-337.]

The objection was:

"Mr. Sweeney: I would like the record to note the objection to the introduction of the evidence on the grounds that there has been no connection between the defendant Fred Stein and the narcotics that was purchased from Mr. Beard, there has been no connection between Mr. Beard and Mr. Stein by way of direct testimony, and therefore we note our objection." [Rep. Tr. p. 335.]

11. The Court erred in overruling objections of appellant's counsel to testimony by the witness Evelyn Stein on cross-examination concerning appellant's occupation for eight or nine years as not proper cross-examination and immaterial.

Objection:

"Mr. Sweeney: Your Honor, I am going to object to this line of questioning as improper cross-examination. I don't think any of these points were gone into on direct. I think the direct was limited to two specific trips and not to any general married life or general background of these parties. I therefore think it is not only immaterial but it is improper cross-examination."

The testimony related to the manner in which Mr. Stein handled his automobile business and whether he

worked with dealers or independently on his own account. [Rep. Tr. pp. 382-384.]

12. The Court erroneously instructed the jury on the law of a conspiracy. [Tr. pp. 65-66.]

13. The Court erred in denying appellant's motion for a new trial. [Motion, Tr. p. 68; Denial, Tr. p. 70.]

14. The Court erred in fixing the total sentence of appellant at 50 years, which amounts to cruel and inhuman punishment within the Eighth Amendment to the Federal Constitution. [Rep. Tr. p. 651.]

15. The Court erred in denying appellant's motion, made at the conclusion of the Government's case, to acquit the appellant on Counts One, Three, Four, Five and Six. [Rep. Tr. pp. 349-354.]

V.

SUMMARY OF ARGUMENT.

The refusal of the Court to grant appellant time to secure counsel to defend him at the trial denied the appellant a fair trial within the meaning of the Sixth Amendment to the Federal Constitution.

Glasser v. United States (1942), 315 U. S. 60,
62 S. Ct. 457.

The right of an accused to counsel is a matter of substance and not form. It is the solemn duty of the trial judge to make sure that representation of an accused by counsel is not an empty gesture but is the fulfillment of the spirit and purpose of the constitutional mandate.

FEDERAL CONSTITUTION, SIXTH AMENDMENT.⁴

Glasser v. United States, supra;

Von Moltke v. Gillies (1948), 332 U. S. 708, 68 S. Ct. 316;

Johnson v. Zerbst (1938), 304 U. S. 458, 58 S. Ct. 1019;

Thomas v. Hunter (C. A. 10, 1946), 153 F. 2d 834;

Jones v. Huff (C. A., D. C., 1945), 152 F. 2d 14.

Noncompliance with the constitutional mandate of assistance of counsel to one charged with a crime deprives the Court of jurisdiction to proceed.

Johnson v. Zerbst, supra;

Kuczynski v. United States (C. A. 7, 1945), 149 F. 2d 478.

The appellant did not have a trial, as that term is usually understood, because attorney Sweeney, who was forced upon appellant as his counsel, failed to do the ordinary things in appellant's defense which any competent attorney would have done as shown by *Assignment of Error 3, subdivisions a to l, inclusive, ante*.

Jones v. Huff (C. A., D. C., 1945), 152 F. 2d 14.

In the prosecution of a person for purchasing and selling narcotics the failure of the Government to call as a witness a person who was induced by a Government agent to attempt to purchase narcotics from accused

⁴"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

raised an inference against the Government on which the Court should have instructed the jury.

Robinson v. United States (C. A. 9, 1959), 262 F. 2d 645, approving

Morei v. United States (C. A. 6, 1942), 127 F. 2d 827.

If it be conceded that attorney Sweeney is a competent lawyer, the appellant did not have a fair trial as it appears from the record that Sweeney was protecting himself and not his client, which reduced to simple terms means that Sweeney did not give the appellant the defense to which due process under the Fourteenth Amendment to the Constitution accorded him. Furthermore, the instruction of the Court that the evidence of an accomplice should be received with caution did not fill the gap made in the defense of the appellant by the denial of the Court of a right to cross-examine the accomplices here, Browning and Winfrey and his wife, on an agreement for leniency and as to whether the accomplices believed that their testimony would be in their own best interest.

Cash v. Culver (1959), 79 S. Ct. 432.

In a prosecution for a conspiracy to violate the Federal Narcotics Act the declarations of a conspirator are not admissible against a defendant where the conspiracy, as here, was not established.

Ong Way Jong v. United States (C. A. 9, 1957), 245 F. 2d 392.

Guilt may not be established by mere association however close. It is true that the evidence as to Stein's association with Browning and the Winfreys and his prior record of a conviction for narcotics raises a suspicion of

guilt; but a suspicion, however strong, is not proof and will not serve in lieu of proof.

Evans v. United States (C. A. 9, 1958), 257 F. 2d 121.

If there ever was a conspiracy here the testimony of the Government's witness Browning established that the conspiracy terminated in May, 1956. All evidence introduced by the Government of overt acts after termination of the conspiracy was inadmissible and seriously prejudiced the appellant's rights before the jury as to all counts in the indictment, as every alleged overt act of a sale was translated into substantive offenses in subsequent counts in the indictment.

Krulewitch v. United States (1949), 336 U. S. 440, 69 S. Ct. 716;

Lutwak v. United States (1953), 344 U. S. 604, 73 S. Ct. 481.

The evidence was insufficient to convict the appellant on Counts One, Three, Four, Five and Six.

Ong Way Jong v. United States (C. A. 9, 1957), 245 F. 2d 392;

Evans v. United States (C. A. 9, 1958), 257 F. 2d 121;

Robinson v. United States (C. A. 9, 1959), 262 F. 2d 645;

Thomas v. Hunter (C. A. 10, 1946), 153 F. 2d 834;

Morei v. United States (C. A. 6, 1942), 127 F. 2d 827;

Glasser v. United States (1942), 315 U. S. 60, 62 S. Ct. 457;

Krulewitch v. United States (1949), 336 U. S. 440, 69 S. Ct. 716;

Cash v. Culver (1959), 79 S. Ct. 432.

VI.
ARGUMENT.

POINT I.

The Refusal of the Court to Grant Appellant Time to Secure Counsel to Defend Him at the Trial Denied the Appellant a Fair Trial Within the Meaning of the Sixth Amendment to the Federal Constitution. The Right of an Accused to Counsel Is a Matter of Substance and Not Form. It Is the Solemn Duty of the Trial Judge to Make Sure That Representation by Counsel of an Accused Is Not an Empty Gesture but Is a Fulfillment of a Constitutional Mandate. Noncompliance With the Constitutional Mandate of Assistance of Counsel at the Trial to One Charged With a Crime Deprives the Court of Jurisdiction to Proceed.

When the case was called for trial September 16, 1958, the only attorney designated of record for appellant by appearance praecipe was Harry E. Weiss, 448 South Hill Street, Los Angeles. This praecipe had been filed April 7, 1958. It was signed by appellant Fred Stein and by attorney Harry E. Weiss. [Tr. p. 15.] Mr. Sweeney had appeared on three or four occasions for appellant but it seems that these appearances were on behalf of Mr. Weiss. In this capacity at the opening of the trial, attorney Sweeney moved the Court for a continuance on three grounds, all of which from his statement appear quite vague. The first ground of the motion for a continuance was that attorney Sweeney did not know that the case was going to trial until Friday of the preceding week, four days before the commencement of the trial. Mr. Sweeney's lack of knowledge that the case was going to trial, so he said, was based upon some kind

of plea that was being negotiated, by whom it does not appear, that the appellant would make in the State Court where no charges were pending against appellant. Sweeney hinted that there were some negotiations going on between Federal and State narcotics officers for such a plea. The defense of a person in a criminal case does not travel on a plane so flimsy as negotiations for plea in another court where no charges have been made again him. The only reasonable conclusion to be drawn from the first ground of Mr. Sweeney's motion for a continuance was that he was engaged in some sort of manipulation with the State narcotics officers to help himself out on the narcotics and bribery charges which had been filed against him in the State Court two weeks prior to the opening of appellant's trial. It is not within the realm of common sense that Mr. Sweeney could make an adequate defense for the appellant in the Federal Court when he, Sweeney, was laboring under a charge of narcotics peddling and bribery in the State Court. Sweeney confessed his inability to make an effective defense for appellant because his defense of the appellant might react adversely to him, Sweeney, in his defense of the narcotics and bribery charges in the State Court.

The second ground of the motion amounted to nothing more or less than a vague reference to some kind of a deal relating to some testimony that appellant was supposed to have given in the case of *United States v. Michael Cohen* which did not involve a narcotics charge.

The third and real ground of the motion for continuance was that Sweeney wanted the continuance in order that the appellant might get additional counsel so that

any publicity which might result from the trial of appellant if he, Sweeney, appeared as his attorney would not react against Sweeney and the defense of himself on the narcotics and bribery charges which had just been brought against him two weeks before in the Superior Court of Los Angeles. [*Ante*, Specification of Error No. 1; Rep. Tr. pp. 4-8.]

While attorney Sweeney adverted to the adverse publicity he had received from his troubles in the State Court in his motion for continuance so that appellant could obtain other counsel, he did not elaborate. Samples of the publicity appear in the appendage of this brief.⁵

After the long discussion between the Court and counsel for the government and for appellant, which appears *ante* under Specifications of Error No. 1, the Court, in effect, compelled appellant to accept Sweeney as his counsel and to sign in Court a designation of Sweeney as his counsel and Sweeney signed the praecipe to that effect. [Rep. Tr. pp. 66-68.]

Attorney Harry Weiss was, as shown above, at the time case was called the attorney of record for appellant, designated as such in a designation signed by appellant and a praecipe signed by Mr. Weiss April 7, 1958. [Tr. p. 15.] There is nothing in this record to show that Mr. Weiss ever retired from his representation of the appellant

⁵While these two samples of the adverse publicity against Mr. Sweeney do not appear in the record, counsel feels justified in putting these samples in the appendix to this brief as Sweeney made the publicity a factual ground for his motion for a continuance. It is probable that if Sweeney had enlightened the Court by showing the Court samples of the publicity, the Court would have granted appellant's motion to continue the case so that appellant might get other counsel to defend him who would not have had the insurmountable burden of defending the appellant and himself on the related charges.

or that the appellant ever decided that he should retire. It could be that Mr. Weiss sent in Mr. Sweeney to appear in his place as attorney for the appellant. The Court said when he found that Mr. Weiss did not show up for the trial that this was not the first time that the Courts had had trouble with Mr. Weiss. The Court mentioned a case in which the defendant was convicted and then the defendant claimed that Mr. Weiss was never his attorney. Obviously, Sweeney was trying to protect Mr. Weiss and, at the same time, get shut of the case, himself. The Court, apparently becoming somewhat impatient with the situation, stated that Mr. Weiss had better come in to Court at once and directed the Marshal to go for Weiss, making the statement that, "I sort of have a feeling that Mr. Weiss is playing horse with the Courts." [Rep. Tr. pp. 67-68.]

The Sixth Amendment which guarantees the right of a defendant in a criminal case to counsel at all stages of a trial, is not satisfied by a lawyer, who accepts an employment and then "plays horse with the Courts"; or counsel in the position which Sweeney occupied, who cannot put on an adequate defense of a person charged with a crime for fear that whatever is brought out in the defense of the client may react unfavorably to the attorney in a criminal proceedings pending against the attorney in the local State Court on a similar charge to that which the client is charged in the Federal Court.

The constitutional right to counsel provided by the Sixth Amendment was not met by the vacillations of Sweeney and Weiss in this case. Obviously, Sweeney was trying to protect himself first, and Weiss second, with the appellant left in the unfortunate position of not knowing what to do or say. The Sixth Amendment was plainly violated when the Court denied appellant's motion

for a continuance to obtain other counsel and, in effect, compelled him to go ahead with his trial with Sweeney representing him. [Rep. Tr. pp. 66-68.]

The case of *Glasser, Kretske, Kaplan and Roth v. United States* (1942), 315 U. S. 60, 62 S. Ct. 457, seems to be directly in point here. In that case, Glasser, Kretske, Kaplan and Roth were indicted. The four persons mentioned were found guilty upon an indictment charging them with conspiracy to defraud the United States. (18 U. S. C., Sec. 88.) The Court of Appeals affirmed the convictions. (116 F. 2d 690.) Glasser, Kretske and Roth petitioned the Supreme Court for certiorari, which was granted. Glasser and Kretske had been assistant United States Attorneys until a short time before the indictment was returned.

William Stewart was employed by Glasser to represent him and entered his appearance as Glasser's attorney. The firm of Harrington and McDonald entered their appearance for Kretske. At the commencement of the trial, McDonald informed the Court that Kretske did not wish to be represented by him. The Court then asked Stewart if he could act as Kretske's attorney. Defendant Glasser, who was represented by Stewart, said he would like to have his own attorney represent him, alone. After a colloquy between counsel and the Court, the Court entered an order vacating the appointment of McDonald as attorney for Kretske, and appointed Stewart to represent him. Glasser remained silent. Stewart thereafter represented Glasser and Kretske throughout the trial. At the conclusion of the trial, all of the defendants were convicted, and the Seventh Circuit affirmed. (116 F. 2d 690.) The Supreme Court granted certiorari.

Numerous grounds were urged in the Supreme Court for reversal. The Supreme Court affirmed the convic-

tion of Kretske and Roth but reversed Glasser's conviction. Glasser's conviction was reversed solely upon the ground of the appointment by the Court of his counsel, Stewart, to represent Kretske. It is impossible to distinguish the *Glasser* case from the case involved. In the case involved, Sweeney did not want to be forced to trial as appellant's attorney because he feared it would hinder the defense of himself in the similar charge which he was then facing in the State Court. The Supreme Court reversed the *Glasser* case because there was some conflict in the defense by Stewart of both Glasser and Kretske. On the face of things, it is clear that Sweeney was faced with a much more serious problem as he, himself, was involved personally. It is too much to expect of human nature that an attorney would do his best in a criminal case to defend his client, where a vigorous defense of the client would have the effect of embarrassing the attorney in the defense of himself on a similar charge. Reversing the conviction of Glasser. The Supreme Court said:

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. *Snyder v. Massachusetts*, 291 U. S. 97, 116, 54 S. Ct. 330, 336, 78 L. Ed. 674, 90 A. L. R. 575; *Tumey v. Ohio*, 273 U. S. 510, 535, 47 S. Ct. 437, 445, 71 L. Ed. 749, 50 A. L. R. 1243; *Patton v. United States*, 281 U. S. 276, 292, 50 S. Ct. 253, 256, 74 L. Ed. 854, 70 A. L. R. 263. And see *McCandless v. United States*, 298 U. S. 342, 347, 56 S. Ct. 764, 766, 80 L. Ed. 1205. Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from em-

barrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance. Here the court was advised of the possibility that conflicting interests might arise which would diminish Stewart's usefulness to Glasser. Nevertheless Stewart was appointed as Kretsk's counsel. Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment. This error requires that the verdict be set aside and a new trial ordered as to Glasser." (315 U. S. pp. 75, 76; 62 S. Ct. pp. 467-468.)

At this point we again advert to the publicity mentioned by attorney Sweeney when he made the motion for continuance of the trial so that other counsel could be secured and relieve him from the burden of taking the chance by the trial of appellant's case of hurting his defense to the charges pending against him in the State Court, filed just two weeks before. Although the newspaper clippings attached are not a part of the record, we feel justified, under the circumstances, in attaching them as an appendix to this brief. Once attorney Sweeney had mentioned the

publicity, it was his duty as an officer of the Court to inform the Judge of the particulars of the charges against him in the State Court; and, too, it possibly was the Judge's duty to continue the case at least long enough for the Judge to find out, from the actual facts, what was on attorney Sweeney's mind, and thus clarify the vague and indefinite statements he made to the Court.

In *Johnson v. Zerbst* (1938), 304 U. S. 458, 58 S. Ct. 1019, and *Von Moltke v. Gillies* (1948), 332 U. S. 708, 68 S. Ct. 316, both habeas corpus proceedings, the Supreme Court held that the lack of the assistance of counsel at a trial in a criminal case deprived the Court of jurisdiction to proceed. All the cases hold that a defendant is entitled to counsel of his own choosing. Appellant did not choose Sweeney to try this case for him and tried as best he knew how to get rid of him. But he was unable to do so and was forced to accept him and proceed with the trial, resulting in the unfortunate circumstances in this brief detailed of a 50 year sentence meted out to a man of 51 years on which he is not entitled to parole.

It was said in *Johnson v. Zerbst*:

"There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

“The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.” (304 U. S. pp. 464-465, 58 S. Ct. 1023.)

Sweeney confessed that he had done nothing to prepare for appellant's trial. He had busied himself with his own troubles during the two weeks immediately preceding the trial and had engaged in some form of manipulations to have appellant make a plea in the State Court where he had not been charged with anything. This was an indulgence in frivolity by attorney Sweeney and the Court would have been justified if it had made inquiry into the subject, in finding that Sweeney was talking with the State authorities in his own behalf, with no thought of his client's welfare.

It was said in *Von Moltke v. Gillies*, *supra*:

“Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely intelligent. Conspiracy charges frequently are of broad and confusing scope,

and that is particularly true of conspiracies under the Espionage Act. See e.g., *Gorin v. United States*, 312 U. S. 19, 61 S. Ct. 429, 85 L. Ed. 488; *United States v. Heine*, 2 Cir., 151 F. 2d 813. And especially misleading to a layman are the overt act allegations of a conspiracy. Such charges are often, as in this indictment, mere statements of past associations or conferences with other persons, which activities apparently are entirely harmless standing alone. * * *

"It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings. *Johnson v. Zerbst*, 304 U. S. 458, 463, 58 S. Ct. 1019, 1022, 82 L. Ed. 1461, 146 A. L. R. 357; *Hawk v. Olson*, 326 U. S. 271, 278, 66 S. Ct. 116, 120, 90 L. Ed. 61. This duty cannot be discharged as though it were a mere procedural formality. * * *

"The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." (332 U. S. pp. 322, 323, 324, 68 S. Ct. pp. 722, 723.)

POINT II.

Appellant's Motion for a New Trial Should Have Been Granted; or at Least Appellant Should Have Been Given the 5 Days Allowed in Rule 33, Federal Rules of Criminal Procedure to Make His Motion for New Trial.

Counsel are aware of the rule that the granting or denying of a motion for new trial is a matter within the sound discretion of the trial court. (*Gage v. United States* (C. A. 9, 1948), 167 F. 2d 122, 125.) The denial of the motion for new trial in this case stands on a different footing. The motion for new trial was largely in the statutory form. (*F. R. Cr. P.*, 18 U. S. C., Form 23, p. 623.) Paragraph 9 of the motion [Tr. p. 68] differs from the statutory form and is as follows:

“The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances, defendant was not granted a reasonable continuance in order for him to secure additional counsel.”

It is evident from that statement in the motion for a new trial that Mr. Sweeney was desirous of avoiding the dilemma in which he found himself at the trial of trying to represent the appellant and at the same time be careful not to trample on his own feet in the State narcotics and bribery cases pending against him. It seems that this was the last opportunity Mr. Sweeney had to raise the vital point, that he had been unwillingly pushed into the trial of the case when he knew that he could not represent the appellant effectively without infringing upon the defenses which he, Sweeney, had to make in the narcotics and bribery charges pending against him in the Superior Court for the County of Los Angeles. At this point, if the Court

had given appellant the 5 days fixed by Rule 33 to make his motion for a new trial, enough time would have been allowed for appellant to obtain other counsel, unfettered by personal considerations, who probably could and would have brought this case on the motion for new trial within the rule of *Glasser v. United States, supra*; *Johnson v. Zerbst, supra*; *Von Moltke v. Gillies, supra*; and *Cash v. Culver* (1959), 79 S. Ct. 432.

The appellant was entitled as a matter of law, under Rule 33, to such consideration and should have been allowed to obtain other counsel to present the facts of the incompetent manner in which Mr. Sweeney handled the trial, not due to Mr. Sweeney's lack of ability, but to the ghost of Sweeney's own trial lurking in his subconscious mind and constantly signaling to Sweeney to be careful of what he did in defense of appellant, as any move he might make for appellant would embarrass him at his own trial.

The appellant was thus denied a fair hearing on his Motion for new trial, in violation of Rule 33. In the circumstances, appellant was not given due process of law within the meaning of the 5th Amendment or allowed assistance of counsel for his defense as guaranteed to him by the 6th Amendment. (*Jones v. Huff, supra*; *Glasser v. United States, supra*; *Johnson v. Zerbst, supra*; *Von Moltke v. Gillies, supra*.)

The rights guaranteed by the 5th and 6th Amendments cannot be served by applying them to suit the personal convenience of a judge. The Court refused to hear the motion unless it was filed immediately and argued the next day after the verdict, September 23, 1958, which was a Tuesday. [Rep. Tr. pp. 639-640.] The record indicates that the Judge was leaving on his vacation the afternoon

of the 23rd of September and would be gone for an indefinite period. [Rep. Tr. pp. 639-640.] The fact that the Judge was going on his vacation the afternoon of September 23, 1958, could have exercised an unconscious influence upon the Judge, moving him to deny a continuance of the trial on September 16, 1958, knowing that he would be leaving on September 23, 1958, and that the trial would take up most of the intervening time. A defendant in a criminal case may not be deprived of any right to suit the convenience of a Judge. While the convenience of the Court may be important, the convenience of a judge of the court is of no consequence. The Court should have allowed appellant the 5 days provided in Rule 33. Failure to do so requires a reversal of the order denying appellant's motion for new trial.

POINT III.

Attorney Sweeney's Defense of the Appellant in the Trial Was Inadequate and Incompetent, so Much so That the Appellant Did Not Have a Trial Within the Meaning of the Sixth and Eighth Amendments to the Constitution.

Attorney Sweeney's weak, inadequate and incompetent defense of appellant at the trial could have been avoided at the outset if Sweeney had strongly impressed upon the Court at the commencement of the trial his inability, for personal reasons, to defend the case properly. The opportunity arose again upon the motion for new trial but Sweeney failed to demand the 5 days appellant was entitled to under Rule 33 to make his motion. Instead of taking a firm position at the commencement of the trial, and upon the motion for new trial, Sweeney weakly acceded to his being pushed into the trial of the case and to making the motion for new trial prior to the 5 days

time he was allowed by Rule 33. Sweeney's failure to insist upon a continuance at the beginning of the trial and his failure to insist upon the right of the appellant to have 5 days within which to make the motion for new trial have been fully covered in Points 1 and 2 above. We advert to these failures now for the purpose of pointing out the particulars in which Sweeney failed to give the appellant any more than a token defense, which failures we have set up in detail in *Assignment of Errors* No. 3, *ante*.

Appellant was convicted solely upon the testimony of three government witnesses, Quentin Browning, Clarence Winfrey and Celeste Winfrey, described in the indictment as "unindicted co-conspirators," and four officers, William C. Gilkey, James H. Mulgannon and Lawrence Katz, Federal Narcotics Agents, and William R. Farrington, who is a deputy sheriff in Los Angeles County, assigned to the narcotics division. Attorney Sweeney did not, at the conclusion of the testimony of any of these witnesses, demand the production of statements and reports which the witnesses had made in the case, as he should have done. (18 U. S. C., Sec. 3500.)

The production of the statements and reports of those witnesses, made prior to the trial, was the only sure way to develop, on cross examination of the Government's witnesses, the manipulations of the officers and the promises of the officers to Browning and to the two Winfreys of immunity from prosecution and all other important things to the defense in their testimony. The statements and reports would have been of the greatest value in the defense of the appellant, as he was convicted solely upon the testimony of the accomplices. Nothing could have occurred, which could have demonstrated more clearly Sweeney's incompetence, than the failure to demand the statements. It

cannot be supposed that Sweeney was ignorant of Section 3500 or the case of *Jencks v. United States* (1957), 353 U. S. 657, 77 S. Ct. 1007. Section 3500 is known by its popular name as the Jencks law. The section became effective in September, 1957, and was based on the *Jencks* decision. Due to the wide publicity following the *Jencks* decision and the adoption of Section 3500, a lawyer practicing criminal law, as Sweeney was, who did not know about the section and its several intendments would, in itself, be enough to demonstrate his incompetence to try a criminal case in the Federal Courts. There is no answer to Sweeney's failure to take advantage of this vital element in the defense of appellant other than the fact that the record indicates that he, himself, was involved in the narcotics racket and that he did not dare to ask for the reports, as the manipulations prior to the trial, in which he confessed he had indulged, would probably have exposed him as as a member of the racket.

Under *Jencks v. United States, supra*, if Mr. Sweeney had demanded the reports and they had been refused, there was nothing the Government could have done but dismiss the indictment.

In order that we may keep this brief within the limits provided by Rule 18(e) we think it sufficient to refer to the other harmful omissions of Sweeney at the trial by inviting the Court's attention *ante* to *Assignment of Errors* 3(b)—(1) where these vital omissions of Sweeney are set forth with particularity and with the transcript references.

The relationship between client and attorney is of the most sensitive character. The statutes and rules of professional conduct put this relationship on a level higher than that trodden by the crowd in a workaday world. The

mere fact that an attorney is charged in a formal criminal complaint with narcotics peddling and bribery in connection with such peddling should disqualify him while he is laboring under those charges from appearing in any Court, and especially, in defense of a narcotics case in which he confesses to the Court that he himself might be incidentally involved. A defendant charged with the sale and distribution of narcotics would be, by public acclaim, convicted before his trial started, if the jury suspected that the attorney representing defendant had been himself charged in a formal complaint with being a narcotics peddler.

The recent decision of *Cash v. Culver* (Feb. 24, 1959), 79 S. Ct. 432, seems to us to be directly in point. The facts in *Cash v. Culver* are analogous to those of appellant's case. The *Cash* case came up from Florida on a petition for *habeas corpus*. The case holds that the 14th Amendment requires that the accused must have legal assistance at a trial in a state court. The defendant, Cash, was charged and convicted of burglary in Florida. He was sentenced to 15 years in the penitentiary. His accomplice, Allen, who testified for the State got 10 years and probation. Defendant Cash had counsel but his counsel withdrew from the case just prior to trial. Cash asked for a continuance to obtain counsel, or that the court appoint counsel to defend him; the Court denied the motion. The case went to trial with Cash appearing for himself.

In spite of Florida law, which provides counsel for defendant only in a capital case, the Supreme Court reversed the decision of the Florida Supreme Court which had affirmed the order of the lower court denying Cash's petition for *habeas corpus*. The Supreme Court said:

"In the 17 years that have passed since its decision in *Betts v. Brady*, 316 U. S. 455, 62 S. Ct. 1252, 86

L. Ed. 1595, this Court, by a traditional process of inclusion and exclusion has, in a series of decisions, indicated the factors which may render state criminal proceedings without counsel so apt to result in injustice as to violate the Fourteenth Amendment. The alleged circumstances of the present case so clearly make it one where, under these decisions, federal organic law required the assistance of counsel that it is unnecessary here to explore the outer limits of constitutional protection in this area.” (79 S. C. pp. 435-436.)

The *Cash* case is also controlling authority on the point that Attorney Sweeney was derelict in his duty in not demanding the statement or reports of the Government witnesses who testified at the trial (18 U. S. C., Sec. 3500) as the reports or statements were the best foundation for cross-examination of the accomplices, Browning, and the two Winfreys, on whether or not they were “testifying under an agreement for leniency” and whether or not they believed that their testimony would be in their “best interest.” (79 S. Ct. p. 436.)

Counsel for appellant respectfully assert that if they are right as they think they are, that appellant has been denied a fair trial because he had to go through his trial with Attorney Sweeney as his lawyer, then the conviction on all counts of the indictment should be reversed. However, the gravity of the charges in the indictment and the severity of the sentence constrains counsel to attack the conviction on the following additional grounds which they believe to be meritorious.

POINT IV.

The Evidence Is Insufficient to Justify the Verdict on Any One of the Five Counts in the Indictment, Counts One, Three, Four, Five or Six, Upon Which Appellant Was Convicted.

Count One charges a conspiracy between appellant and three "unindicted co-conspirators," Quentin Browning, Clarence Winfrey and Celeste Winfrey. Seventeen overt acts are alleged in the indictment. The indictment charges that the conspiracy was formed on or about January 1, 1956 and lasted until July 11, 1957. The indictment alleges the date of the first overt act as January 21, 1956; and, the seventeenth and last one, as July 11, 1957. [Tr. pp. 1-3.]

We believe that the Court correctly stated the rule when overruling an objection of appellant's counsel Sweeney to a question by the District Attorney of what Winfrey said to Browning concerning his interest in the "stuff" if the quality of the "stuff" was what it was supposed to be. The grounds of Mr. Sweeney's objection were that no foundation had been laid and that the conversation was not in the presence of the defendant. The Court overruled the objection, stating:

"And the conversations out of the presence of one of the other conspirators are admissible if there is sufficient evidence from which a reasonable person could conclude that a conspiracy had been formed."
[Rep. Tr. p. 87.]

It is appellant's position that the record is barren of "sufficient evidence from which a reasonable person could conclude that a conspiracy had been formed." The only testimony on the subject of the formation of a conspiracy was that of accomplice Browning. There is nothing in

the testimony of the Winfreys, separately or together, sufficient to establish or tend to establish a preliminary agreement for a conspiracy or that if one had been formed that the Winfreys joined it.

Browning testified over the objection of appellant to the conclusion that: "We were partners. We were to be partners." [Rep. Tr. pp. 71-77.] Browning testified that the alleged agreement or partnership was formed in Los Angeles. At their first meeting, there was no discussion of narcotics. [Rep. Tr. p. 71.] Appellant denied that there was any agreement or partnership of any sort between him and Browning. [Rep. Tr. p. 442.] Appellant denied that when he went to New York that he went there pursuant to an agreement between him and Browning to purchase narcotics, or that he went there for the purpose of purchasing narcotics. [Rep. Tr. pp. 455-456.] Appellant testified that he went to New York with Evelyn Babbins, the woman he afterwards married, and her daughter, arriving September 6, 1956. Appellant then remained in New York while Evelyn Babbins and her daughter went on to Buffalo to visit her father, who was ill. [Rep. Tr. p. 434.] Appellant's testimony was corroborated by Evelyn Babbins. [Rep. Tr. pp. 368, 369.]

The only testimony in the record that there was a partnership or agreement of any kind between Browning and appellant is that mentioned above where Browning testified over the objection of appellant to the conclusion that he and appellant had a partnership or agreement. [Rep. Tr. pp. 71-77.] Browning testified that the so-called partnership was terminated May, 1956, and was not continued in any way thereafter. [Rep. Tr. pp. 114-115: 123-124.] It is alleged in Overt Act No. 1 [Tr. p. 2]: "That on or about January 21, 1956, defendant Fred Stein delivered three ounces of heroin to Quentin Browning."

It is charged in Count Two of the Indictment [Tr. p. 4] that on or about January 21, 1956, appellant sold and facilitated the sale of approximately two ounces of heroin to Quentin Browning. It follows that Overt Act No. 1 is translated into the substantive offense charged in Count Two. Count Two was dismissed.

Appellant is charged in Count Three with having facilitated the sale, on January 21, 1956, to Clarence Winfrey and Celeste Winfrey of the same heroin he is charged with having sold and facilitated the sale of to Quentin Browning in Count Two. This is also the same heroin which is mentioned in the conspiracy count, Overt Act, No. 1. [Tr. pp. 1-4.] It does not appear at the time laid in Overt Act, No. 1, and in Count Two, that appellant had any contact whatever with Clarence Winfrey or Celeste Winfrey, his wife. The evidence relating to the conspiracy count and Overt Acts Nos. 1 to 7, inclusive, raise a mere suspicion of guilt by association, which cannot be accepted in lieu of proof. (*Ong Way Jong v. United States* (C. A. 9, 1957), 245 F. 2d 392; *Evans v. United States* (C. A. 9, 1958), 257 F. 2d 121; *Robinson v. United States* (C. A. 9, 1959), 262 F. 2d 645; *Thomas v. Hunter* (C. A. 10, 1946), 153 F. 2d 834; *Morei v. United States* (C. A. 6, 1942), 127 F. 2d 827.) Those cases following the rule recently laid down by the Supreme Court. (*Glasser v. United States* (1942), 315 U. S. 60, 62 S. Ct. 457; *Krulewitch v. United States* (1949), 336 U. S. 440, 69 S. Ct. 716; *Cash v. Culver* (1959), 79 S. Ct. 432.)

The testimony of Browning that the so-called partnership between him and appellant was terminated in May, 1956, eliminates Overt Acts, Nos. 8 to 17, inclusive. [Rep. Tr. pp. 114-115; 123-124.] We feel that the

Government will be unable to take advantage of Attorney Sweeney's failure to object to this testimony on the ground that the conspiracy, if one ever existed, had terminated. (*Ante*, HEADING VI, ARGUMENT, POINTS I TO III, INCLUSIVE.) We feel that the above is sufficient to dispose of both the conspiracy count and Count Three, as we have already shown that the testimony creates nothing more than a suspicion, which is not acceptable in lieu of proof.

Counsel for appellant feel that the conviction on Counts One and Three must fall for another reason. There is not one word of testimony in the record relating to Counts One and Three or to any of the other four counts alleged in the indictment, including Count Two, which was dismissed, that heroin or any other narcotic substance was involved in any of the overt acts alleged in Count One or the substantive offenses alleged in Counts Two, Three, Four, Five and Six. It is true that the packages which the accomplices Browning and the two Winfreys said were involved in the six counts charged in the indictment were said by the accomplices to contain "stuff" or "merchandise"; the word heroin or narcotic is not mentioned in their testimony. It was assumed by the Government and by the jury that the packages involved contained heroin and that the charges in the indictment that they contained heroin followed, although there is not one word of testimony in the record that any of these packages was ever examined by a chemist to determine the contents nor does anyone know from this record what the packages contained, as none of them was produced by the Government at the trial and the contents of none of the packages was analyzed by a chemist.

The faults outlined above as to Counts One and Three reappear in Counts Four, Five and Six.

Count Four.

Count Four is a translation into a substantive offense of Overt Acts 3, 4 and 6. We have already shown above how there was no proof of a conspiracy between appellant and Quentin Browning because no evidence was introduced of the conspiracy except the conclusion of Browning, admitted over the objection of appellant, that he and appellant were partners. There is not a word of testimony in the record that there was any agreement of any sort between appellant and the Winfreys. Thus, the conspiracy count and its relationship to Count Four are ended.

Count Four charges as a substantive offense, that appellant, on or about February 15, 1956, sold and facilitated the sale of three ounces of heroin to Clarence Winfrey and Celeste Winfrey. The only testimony of this sale was that of the two Winfreys. The testimony of Clarence Winfrey on Count Four was that he telephoned appellant and asked for some "stuff" or "merchandise." Later during the night of that same day, Winfrey got a telephone call which, as far as he could remember, was appellant's voice, and of which he said that appellant told him to meet him at the same place. Winfrey and his wife met appellant at Bronson and Washington Streets in Los Angeles. The Winfreys testified that appellant handed to Celeste Winfrey, who was in the car with her husband, a cellophane bag which contained the "merchandise." [Rep. Tr. pp. 208-212.] Appellant categorically denied the whole incident. [Rep. Tr. p. 448.] All of the testimony of the two accomplices does not rise above the level of a suspicion, as the Government offered no proof of what the "merchandise" consisted. If a conviction could be had on such testimony, no one is safe from the manipulations of the police, who could put the finger on anyone

by merely promising immunity to a person who has been arrested for narcotic violations if he will name the source of his supply.

Count Five.

Count Five charges the sale and facilitation of the sale in Los Angeles County on September 10, 1956, of five ounces of heroin by appellant, to Quentin Browning. Here, too, as in Counts Three and Four, there was no proof that the alleged substance was a narcotic. The appellant was convicted on Count Five solely upon the testimony of Browning. Browning testified [Rep. Tr. p. 124] as follows:

“I saw Fred Stein during September, 1956, the early part; I came down and purchased five ‘pieces’ of ‘stuff’ from him, for which I gave him \$3,000.00, and I took the heroin and took it back to San Francisco and sold it.”

This testimony did not fix the date as September 10 or any other definite date and in this connection, it is to be recalled that defendant Stein produced an alibi which was uncontradicted on the part of the Government that from September 6 to September 19, appellant was in New York.

Count Six charges that appellant, on March 3, 1957, in Los Angeles County, sold and facilitated the sale of three ounces of heroin to Clarence Winfrey and Celeste Winrey. This sale, too, was based solely on the testimony of Clarence Winfrey and Celeste Winfrey that they purchased three ounces of “merchandise” from appellant about the time laid in Count Six. There is not a word of testimony in the record as to what the “merchandise” consisted and, as we have said before, appellant denied categorically that he had ever sold or facilitated the sale of narcotics

to Browning, Clarence Winfrey or Celeste Winfrey, or to any of them. We restate here as we have so many times throughout this brief that the Government did not produce at the trial a single particle of heroin or other narcotic substance as having ever been in the possession of appellant or as having ever been sold by him to Browning or the Winfreys, or either of them. The Winfreys or Browning did not testify that the alleged "merchandise" which they received from appellant was heroin or any other narcotic substance. The Government did not ask them to say what it was. Neither of them was a chemist or an expert witness and could not have known whether or not the package contained a narcotic. The point is strengthened by the erroneous admission of evidence over the objection of the appellant, as set forth in Assignment of Errors 4, 5, 6, 7, 8, 9, 10 and 11, *ante*. There the objections are fully set forth in accord with Rule 18, with full transcript references. It appears to us that it would be repetitious to repeat them here, but counsel respectfully assert that the errors admitting this evidence were highly prejudicial to the appellant and that no one could say that the result would not have been different upon all counts that he was convicted if the Court had sustained his objection. Appellant respectfully contends that his convictions on each of Counts One, Three, Four, Five and Six should be reversed.

Respectfully submitted,

WM. H. NEBLETT, and
E. W. MILLER,

Counsel for Appellant.

APPENDIX.

(Los Angeles Times, Sat., Aug. 30, 1958)

ATTORNEY HELD ON DOPE CASE BRIBERY CHARGE

Paul Wesley Sweeney, 31, attorney for Cecil (Hard-rock) Thomas, a dope addict and peddler who was shot to death last Oct. 28, the night before he was to testify for the government in a narcotics case, was booked in the County Jail yesterday on suspicion of bribing a public official and violation of the State Narcotic Act.

Sheriff's narcotics officers arrested Sweeney in front of the Federal Building as he assertedly handed Sgt. Robert Nichols five \$100 bills. Sgt. Nichols said he had been offered the \$500 by Sweeney after nurses at General Hospital called the Sheriff's office when they suspected a woman friend of the lawyer was being passed narcotics from the outside.

The friend, Miss Willie Williams, 29, of 3920 S. Main St., said by Nichols to be a known narcotics addict, was in General Hospital for the withdrawal treatment.

Sgt. Nichols staked out the hospital Thursday and reportedly witnessed Sweeney pass a red balloon to Miss Williams. Nichols said that the woman immediately swallowed the contents except for one pill Sweeney was not arrested at the time because of the unknown contents.

Nichols said Sweeney later contacted him stating, "Listen, if you can make that pill into something else, there's \$500 in it for you."

Officers said Sweeney, who gave his address as 2724 Palm Grove Ave., denied the narcotic charge but admitted passing the \$500 to Sgt. Nichols. "It was a stupid thing to do," he said.

(Los Angeles Tribune, Friday, Sept. 5, 1958)

ATTY. PAUL SWEENEY SAYS SHERIFF'S OFFICE FRAMED HIM

Reputedly brilliant Los Angeles lawyer Paul W. Sweeney was arraigned yesterday in Division 4 of the Municipal Court on one count of bribery and two of narcotics violation, following an arrest which shocked the community last Friday afternoon.

Denying both charges vehemently, Sweeney, for Industrial Relations secretary of the Los Angeles Urban League, claims he was "framed" by the sheriff's officers who say he attempted to bribe them with \$500 after they caught him in the narcotics violation.

In a hasty interview with a Tribune reporter in the Hall of Justice corridor, Sweeney issued a simple denial to the charge that he passed a "red balloon," presumably heroin and some Amidone pills a narcotic, to Miss Willie B. Williams, in the Los Angeles County hospital on the preceding day.

Sweeney also denied the reports that he has been going with Miss Williams, and that she is pregnant by him and has another child by him, and that police had warned him several times previously about supplying her with drugs.

Sweeney is married and the father of two children. He lives with his wife at 2724 Palm Grove. He told the Tribune with reference to Miss Williams, "She is a client, that's all. Everybody knows that."

NOTHING TO DO WITH DOPE UNDERWORLD

Sweeney, who was the lawyer for Cecil "Hardrock" Thomas, narcotics informer, who was shot and killed the night before he was slated to change his testimony and involve Los Angeles Narcotics officers in the dope trade, was asked if his arrest and the alleged "framing" had anything to do with the "Hardrock" Thomas case which the Los Angeles Federal Grand Jury has been inquiring into since January, apparently without coming to any conclusion.

He answered: "Oh, nothing like that.

"This is another situation." He refused to elaborate because he said he did not want to 'tip' the police off.

He said that Miss Williams' "mother called me and told me to go to see her."

"I've defended her in a theft case and a narcotics case," he added.

According to the sheriff's officers they have been "watching" Sweeney some time as he was suspected of smuggling dope to the woman.

On Thursday, Aug. 28, they claim they saw him pass drugs to her in the hospital, and he was placed under arrest.

The officers claim that Miss Williams swallowed the red "balloon," and they got the pills. They released him after questioning, pending outcome of the laboratory tests on the pills.

Sheriff's deputy R. D. Nichols claims that on Friday Sweeney called him and arranged to meet him at a cafe frequented by lawyers in the vicinity of the Hall of Justice, called the Brush and Quill.

When they shook hands, the officer said, Sweeney passed \$500 to him, and was immediately taken into custody on the bribery charge.

Other officers in on the arrest were: L. Peterson, M. Renteria, and W. Farrington, all of the Sheriff's Narcotics squad.

Sweeney denied this in detail.

He said he did not call the Narcotics officers; they called him, he said.

"They arrested me and held me without booking me for hours."

He also claimed that after the "incident happened at the hospital, I went home and called the Chief of Federal Narcotics and told them the story."

This action he said, shows "I wasn't trying to bribe anyone."

While Sweeney was being arraigned, a superior court judge had to recess a murder trial in which he was the defense attorney.

He was released under \$2500 bail, posted by Celeste King, and his case set for preliminary hearing Sept. 25 at 9:30 a.m. in Division 4 before Judge Louis Kaufman.

He is defended by Max Solomon, described as a brilliant criminal lawyer, and he told the Tribune, "I am confident the truth will come out, and I will win the case."

Miss Williams, who is described as an attractive brown-skin woman, was released from the hospital on a surety bond after being filed on for one count of possession of narcotics. Her preliminary has been set for Sept. 18 at 1:45 p.m. and she is being represented by Atty. John Marshall, who was one of the defense attorneys for Wallen

Juan Appleby, who was sent to San Quentin for the bathtub murders of Mr. and Mrs. Walter L. Gordon, Sr., parents of criminal lawyer Walter L. Gordon, Jr.

Courtroom attaches said Miss Williams has been in and out of the County hospital, voluntarily trying to “kick” her narcotics “habit” for the past two years.

Sweeney is a graduate of Howard university law school and worked for the Urban League several years before going into private practice.

